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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ELLIOT MILES IMM,

Defendant and Appellant.

B214883

(Los Angeles County
Super. Ct. No. KA084574)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Wade D. Olson, Judge. Affirmed as modified.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Sarah J. Farhat and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

Elliott Miles Imm pleaded no contest to driving with a blood alcohol level of 0.08 percent or more causing injury (Veh. Code, § 23153, subd. (b))¹ following a three-car accident that resulted in the death of one individual and injury to another. As part of the negotiated plea agreement Imm also admitted the special allegation he had proximately caused bodily injury to more than one victim. As agreed, Imm was sentenced to an aggregate state prison term of four years; and the remaining charges, including vehicular manslaughter, were dismissed. On appeal Imm contends the trial court imposed an unauthorized sentence in ordering him to complete a first-offender alcohol and drug education program. We affirm the judgment as modified.

PROCEDURAL BACKGROUND

Imm was charged by information with vehicular manslaughter without gross negligence (Pen. Code, § 191.5, subd. (b)), driving under the influence of alcohol causing injury (§ 23153, subd. (a)); driving with a blood alcohol level of 0.08 percent or more causing injury (§ 23153, subd. (b)); and possession of marijuana while driving (§ 23222, subd. (b)). At the hearing following the negotiated plea agreement, the trial court granted the People's motion to amend the information to add the more-than-one bodily injury allegation (§ 23558) to the section 23153, subdivision (b), charge.

Imm was represented by appointed counsel at the plea hearing. Imm was advised both orally and in writing of his constitutional rights and the terms of his plea agreement, which were to plead no contest to the section 23153, subdivision (b) count, admit the bodily injury enhancement allegation and be sentenced to state prison for four years (the three-year upper term for the aggravated driving under the influence offense plus a one-year additional bodily injury enhancement). Imm was also informed, as a consequence of his plea, he would be required to provide a DNA sample, to pay a fine of \$390, plus penalty assessments and a surcharge fee, and to complete an alcohol education program.

¹ Statutory references are to the Vehicle Code unless otherwise indicated.

Imm answered orally and in writing he understood and waived his constitutional rights and understood and accepted the terms of his plea agreement.²

Defense counsel joined in the waivers of Imm's constitutional rights and concurred in the plea and admission. The trial court expressly found Imm's waivers, plea and admission were voluntary, knowing and intelligent. The court found, and defense counsel stipulated to, a factual basis for Imm's plea and admission. Immediately thereafter, the court sentenced Imm to the four-year term in accordance with the plea agreement. Without defense objection the court ordered Imm to complete an alcohol education program. The remaining counts were dismissed on the People's motion.

On appeal Imm challenges only the trial court's order he complete an alcohol education program, asserting it is not authorized because he was sentenced to state prison and not to probation. In addition to arguing the requirement Imm complete an alcohol education program is permissible under the circumstances of this case, the People have moved to dismiss the appeal on the ground Imm's appeal is improper without a certificate of probable cause³ and contend he forfeited his claim because he failed to object to the requirement in the trial court. We deferred ruling on the motion to dismiss until our consideration of the merits of Imm's appeal.

² Prior to entering his plea, Imm completed and signed a "felony advisement of rights, waiver, and plea form."

³ Following entry of judgment Imm filed a timely notice of appeal, checking the preprinted boxes indicating, "This appeal is based on the sentence or other matters occurring after the plea"; and "This appeal challenges the validity of the plea or admission." Imm also requested a certificate of probable cause claiming his plea had been based on falsified evidence and the People had withheld some unspecified exculpatory evidence. The trial court denied the request.

DISCUSSION

1. *The Motion To Dismiss the Appeal Is Denied*

Penal Code section 1237.5, subdivision (a), provides a defendant may not appeal a judgment of conviction entered on a plea of guilty or no contest unless he or she has filed a statement with the trial court “showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings” and has obtained a certificate of probable cause for the appeal. (See *People v. Mendez* (1991) 19 Cal.4th 1084, 1096; Cal. Rules of Court, rule 8.304(a)(1).) However, if the appeal is based solely on grounds occurring after entry of the plea that do not challenge its validity, such as sentencing issues not specifically incorporated into the plea agreement itself, a certificate of probable cause is not required. (Cal. Rules of Court, rule 8.304(b)(4)(B); *People v. Cuevas* (2008) 44 Cal.4th 374, 379.)

The People contend the order that Imm complete an alcohol education program was an integral part of the plea agreement and, therefore, cannot be challenged on appeal without also attacking the validity of the plea itself. (See *People v. Cuevas*, *supra*, 44 Cal.4th at pp. 381-382; *People v. Panizzon* (1996) 13 Cal.4th 68, 78.) Thus, the People argue, Imm’s notice of appeal is inoperative; and the appeal must be dismissed.

Contrary to the People’s argument, the record shows the alcohol education program was not part of the negotiated plea agreement. The only penalty specified for Imm’s agreement to plead no contest to a single count of driving with a prohibited blood alcohol level causing injury and to admit the additional bodily injury enhancement was an aggregate state prison term of four years. Indeed, when taking Imm’s plea, the prosecutor did not state Imm was to complete an alcohol education program as a term or condition of the plea agreement.⁴ To be sure, the prosecutor did advise Imm the education program was a consequence of his plea, as were his obligations to pay fines and victim restitution and to submit a DNA sample. But none of those “consequences” is

⁴ Similarly, the completed “felony advisement of rights, waiver, and plea form” did not state Imm was to complete an alcohol education program.

an element of the agreement itself. Accordingly, Imm's appeal is not tantamount to a challenge to the validity of the plea, but rather an attack on a sentencing or post-plea issue for which a certificate of probable cause is unnecessary. (See *Panizzon, supra*, 13 Cal.4th at p. 76.) The People's motion to dismiss is denied.

2. *The Order Imm Is To Complete An Alcohol Education Program Is Stricken as Unauthorized*

Pursuant to section 23554 conviction of a first violation of section 23153 is punishable by imprisonment in the county jail for 90 days to one year or in state prison for 16 months, two years or three years and by a fine of \$390 to \$1,000. (§ 23554.) In addition, the defendant's privilege to operate a motor vehicle must be suspended by the Department of Motor Vehicles pursuant to section 13352, subdivision (a)(2), for a period of one year. The driving privilege may not be reinstated by the Department of Motor Vehicles until the person gives proof of successful completion of "a driving-under-the-influence program licensed pursuant to Section 11836 of the Health and Safety Code as described in subdivision (b) of Section 23556." (§ 13552, subd. (a)(2).)

A defendant found guilty of violating section 23153 and punished under section 23554 may be placed on probation; but, if probation is ordered, the terms and conditions must include confinement in the county jail for at least five days and payment of a fine between \$390 and \$1000. (§ 23556, subd. (a)(1).) In addition, the defendant's driver's license must be suspended pursuant to section 11352, subdivision (a)(2) (§ 23556, subd. (a)(2)); and the court must impose as a further condition of probation that the driver shall participate in, and successfully complete "an alcohol and other drug education and counseling program, established pursuant to Section 11837.3 of the Health and Safety Code" (§ 23556, subd. (b)(1)) or "a driving-under-the-influence program licensed pursuant to Section 11836 of the Health and Safety Code, in the driver's county of residence or employment" (§ 23556, subd. (b)(2).)

As discussed, Imm was advised completion of a driving-under-the-influence alcohol offender program was a consequence of his no contest plea to the charge of driving with a 0.08 percent blood alcohol level or more causing injury. That advisement

was substantially correct: Completion of a driving-under-the-influence program is, in fact, a prerequisite to any reinstatement of his suspended driver's license. Nonetheless, participation in such a program was not an element of the negotiated plea agreement; and, while acknowledging he was aware of the requirement, Imm never affirmatively agreed to it.

Because he was sentenced to prison and not placed on probation, and in the absence of his agreement to participate in and successfully complete a three-month first-offender alcohol and drug education and counseling program, Imm argues the trial court was not authorized by section 23556 or by any other sentencing statute or court rule to impose such a requirement as a formal part of his sentence. He is correct. (Cf. *People v. Nystrom* (1992) 7 Cal.App.4th 1177, 1183 [statute authorizing payment of restitution fine from prisoner's wages does not apply to direct victim restitution; absent statutory authority, trial court could not order payment of direct restitution from prisoner's wages]; *People v. Rowland* (1988) 206 Cal.App.3d 119, 125 [in absence of statutory authority trial court could not order defendant sentenced to prison to pay direct victim restitution].)

The People argue, even if error, Imm has forfeited this issue by failing to object in the trial court. However, an unauthorized sentence may be corrected at any time whether or not there was an objection in the trial court. (*People v. Smith* (2001) 24 Cal.4th 849, 854.) "[A] sentence generally is 'unauthorized' where it could not lawfully be imposed under any circumstances in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) In such circumstances, "[a]ppellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*Ibid.*) Ordering Imm as part of his state prison sentence to successfully complete an alcohol and drug education program was unauthorized under the circumstances of this case and must be stricken.⁵

⁵ As discussed, Imm will be obligated to successfully complete a driving-under-the-influence program as a condition to reinstatement of his driver's license. Moreover, there appears to be no reason the Board of Prison Terms could not impose participation in a

DISPOSITION

The order directing Imm to complete a first offender alcohol and drug education program under Vehicle Code section 23556 is stricken. The superior court shall prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.

three-month (or longer) alcohol and drug education and counseling program as a condition to granting parole to Imm. (See Pen. Code, § 3053, subd. (a).)